

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>MARTHA HERNANDEZ</b>	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 236,901 & 237,276
<b>CRACKER BARREL</b>	)	
Respondent	)	
AND	)	
	)	
<b>PACIFIC EMPLOYERS INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

On April 2, 2002, the Appeals Board heard oral argument in Topeka, Kansas on respondent's Motion for Leave to File Appeal Out of Time.

**APPEARANCES**

Claimant appeared by her attorney, Patrick R. Nichols of Lawrence, Kansas. Respondent and its insurance carrier appeared by their attorney Matthew J. Thiesing of Roeland Park, Kansas.

**RECORD AND STIPULATIONS**

The parties agreed at oral argument before the Appeals Board (Board) that the evidentiary record for the Board to consider in deciding respondent's Motion for Leave to File Appeal Out of Time would consist of respondent's Motion to Quash Subpoenas Duces Tecum and attached affidavits, the December 10, 2001, Phone Conference Transcript and the affidavit of Kathleen Merillat and attached Exhibits 1-8 filed in claimant's Motion and Memorandum Opposing Application to File Appeal Out of Time.

**ISSUES**

The single issue before the Board is whether respondent's application for review of the Administrative Law Judge (ALJ)'s August 31, 2001, Award filed by respondent on October 8, 2001, was timely, or should otherwise be allowed.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record, and considering the arguments contained in the parties' briefs, the Board makes the following findings and conclusions:

Any interested party has 10 days to file a written request with the Board from a final order, award, modifications of an award or preliminary hearing award made by an ALJ. Intermediate Saturdays, Sundays, and legal holidays are excluded in computing this 10 day time period.<sup>1</sup> The effective date of the ALJ's Award is the day after the date noted on the award.<sup>2</sup> The parties' application for review shall be considered timely filed only if received in the central office or in one of the workers compensation division offices on or before the tenth day after the effective date of the award.<sup>3</sup>

Here, the ALJ's Award was dated August 31, 2001. Thus, the effective date was Saturday, September 1, 2001.<sup>4</sup> Because September 2, 2001, was a Sunday and September 3, 2001 was the Labor Day holiday, the first day to commence counting the 10 day appeal time was Tuesday, September 4, 2001. Not counting intermediate Saturdays and Sundays, that fell on September 8, 9, 15, and 16, the respondent had until Monday, September 17, 2001, to timely file an application for review of the August 31, 2001, Award.

But respondent did not file its application for review until October 8, 2001, 21 days after the 10 day appeal time had expired. Respondent contends, because the ALJ sent the Award to the incorrect address of the law firm of respondent's attorney, that respondent's attorney, "personally did not become aware of it (the Award) until October 8."<sup>5</sup> Other than that statement, the record does not contain any evidence that proves the date the law firm actually received the Award. Furthermore, respondent argues that because of the ALJ's error in sending the Award to the former address of the law firm, the 10 day time period for filing an application for review before the Board was tolled. Thus, respondent contends that due process requires the Board to consider its application for review which was filed on October 8, 2001, as timely because it was filed on the same day that respondent's attorney became aware of the Award.

Moreover, respondent contends that the Kansas Supreme Court addressed this very same issue in the case of Nguyen v. IBP, Inc., 266 Kan. 580, 972 P.2d 747 (1999). In

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<sup>1</sup> See K.S.A. 2001 Supp. 44-551(b)(1).

<sup>2</sup> See K.S.A. 44-525(a).

<sup>3</sup> K.A.R. 51-18-2(b).

<sup>4</sup> See McIntyre v. A. L. Abercrombie, Inc., 23 Kan. App. 2d 204, 929 P.2d 1386 (1996).

<sup>5</sup> Phone Conference Transcript, December 10, 2001, p.9.

Nguyen, the court reversed the Board's dismissal of claimant's untimely application for review of an award. The ALJ's Award was dated July 29, 1996. A copy of the Award was mailed by the ALJ to claimant's attorney at her address in Emporia, Kansas. The ALJ, however, mistakenly placed the zip code for Topeka, Kansas in the attorney's address. The Award was not delivered to claimant's attorney's office until September 6, 1996. Thereafter, on September 9, 1996, claimant's attorney filed an application for review before the Board. The Board found that the application for review was filed out of time and this deprived it of jurisdiction. The Board entered an order dismissing the appeal as untimely.

The court in Nguyen found that the right to an appeal in this state is neither a vested nor a constitutional right, but is strictly statutory in nature. However, where the legislature has provided the right of an appeal, the minimum essential elements of due process of law of notice and an opportunity to be heard at a meaningful time and in a meaningful manner must be satisfied.<sup>6</sup> The mere filing of an award is not notice to the parties. It is the mailing of the award and the receipt of the award by the parties that constitutes notice. The court held that where the award is misaddressed to the extent that a party fails to receive the award before the running of the 10 day time limitation, notice has not been provided to satisfy due process of law requirements.<sup>7</sup>

But the claimant argues that the Nguyen case is distinguishable from the facts of this case because in Nguyen claimant proved he did not receive notice of the award until after the 10 day appeal time had expired. Here, however, the respondent does not argue that the law firm did not receive the award within the 10 day appeal time. The respondent only argues that its attorney did not become aware of the award until October 8, 2001. Claimant contends, that before respondent can argue that the misaddressed Award did not provide respondent with notice to satisfy due process, respondent had to prove the Award was received after the 10 day appeal time expired and in this case respondent has failed to do so.

The law firm representing the respondent in this case faxed a notice of a change in the law firm's address to the division of workers compensation on May 25, 2001. On May 29, 2001, the division entered the change of address into its computer system.<sup>8</sup> Also, before the August 31, 2001, Award was entered, respondent's attorney sent his submission letter dated August 16, 2001, and received by the ALJ on August 16, 2001, which also contained the new address of the law firm. The ALJ then sent the Award to the law firm's old address.

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<sup>6</sup> See Nguyen at 588.

<sup>7</sup> See Nguyen at 589.

<sup>8</sup> The Board takes official notice of the change of address entered in the division's files.

The question remains, however, when did respondent receive the ALJ's Award? Attached to claimant's brief filed before the Board is the affidavit of Kathleen Merillat, claimant's attorney's paralegal/legal secretary. On October 9, 2001, she affirmed that she prepared a letter for claimant's attorney's signature addressed to respondent's attorney at his law firm's old address. The letter requested a file-stamped copy of the August 31, 2001, Award or a file-stamped copy of the Written Demand for Compensation sent to the respondent's attorney by claimant's attorney. On October 11, 2001, Ms. Merrilat affirmed that she received a telephone call from respondent's attorney in response to that letter. The telephone call established that the letter had been forwarded to the law firm's new address within 2 days of its mailing to the old address. Additionally, on November 9, 2001, Ms. Merillat affirmed she prepared an empty envelope addressed to the law firm's old address and noted on the envelope, "Return Address Requested." That envelope was returned by the U.S. Postal Service with a forwarding address sticker as follows:

Notify Sender of New Address:  
McAnany, Van Cleave  
5125 Roe Boulevard, #200  
Roeland Park, Kansas 66205-2368.

The purpose of the 10 day time period to file an appeal is to promote finality and to minimize delay in a workers compensation case.<sup>9</sup> The rule prevents an interested party from challenging the ALJ's actions long after the ALJ's award has been made. In this case, the Board acknowledges that the ALJ erred when the Award was sent to the respondent's attorney at his law firm's old address instead of the new address. But the Board finds respondent failed to prove that the ALJ's mailing of the Award to the incorrect address caused the respondent to receive the Award after the 10 day appeal time expired.

The Board finds the more persuasive evidence contained in the record proves that the Award more probably than not was forwarded by the postal service and delivered to the law office's new address within 10 days of the August 31, 2001, Award. Thus, the Board concludes respondent's due process rights were satisfied as respondent was provided with timely notice of the Award. For reasons not completely clear in the record, respondent's attorney did not have knowledge of his law firm's receipt of the Award in order to timely file the appeal. Nevertheless, because respondent failed to file its application for review within the time limitations of K.S.A. 2001 Supp. 44-551(b)(1), the Board does not have jurisdiction to review the Award.

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<sup>9</sup> See Gray. V. Hercules Powder Co., 160 Kan. 767, 772, 165 P.2d 447 (1996).

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Board, that respondent's application for review filed before the Board on October 8, 2001, is out of time and should be and is hereby dismissed. The ALJ's August 31, 2001, Award remains in full force and effect.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May 2002.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Patrick R. Nichols, Attorney for Claimant  
Matthew J. Thiesing, Attorney for Respondent  
Brad E. Avery, Administrative Law Judge  
Philip S. Harness, Workers Compensation Director